

## The Role of Fault in Alimony

Long ago and far away, title and control of all of a woman's property vested in her husband upon marriage. In exchange, the husband became responsible for support of the wife for the remainder of her life. The support obligation continued even through divorce, unless the bad conduct of the wife was the reason for the divorce.

This is the common law foundation linking misconduct –fault – to alimony. Over time, the law came to require that any woman seeking alimony first prove that her husband's conduct rather than her own was the cause of the marital breakup.

### NC Law Before 1995

For many years, North Carolina law reflected this common law principle. Any dependent spouse seeking alimony – whether the husband or the wife – was required to first prove marital fault on the part of the supporting spouse before the court could consider financial need for support. And, even if the supporting spouse was at fault, an act of adultery by the dependent spouse, whether before or after separation, completely barred the adulterer from receiving support.

The present alimony statutes were enacted in 1995 and the new legislation significantly diminished the role of fault in favor of more focus on economic need. However, fault – now referred to as marital misconduct, [GS 50-16.1A\(3\)](#) – remains very relevant in the support determination generally and is still determinative in specific circumstances.

### Postseparation Support (PSS)

While [GS 50-16.2A\(c\)](#) provides that a dependent spouse is entitled to postseparation support (temporary alimony) if the court determines that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay, this entitlement may be dependent upon the court's consideration of marital misconduct. The statute states:

...[T]he judge shall consider marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award postseparation support.... When the judge considers these acts by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support.

[GS 50-16.2A\(d\)](#).

This language indicates at least four things about fault and PSS:

- The court must consider allegations of marital misconduct on the part of the dependent spouse;
- The court cannot consider allegations of misconduct of the supporting spouse unless the court first considers misconduct by the dependent spouse;
- All marital misconduct is equal under the law in PSS proceedings, meaning adultery (called ‘illicit sexual behavior’) is not necessarily worse than any other misconduct; and
- While the court must consider allegations of marital misconduct, the impact of marital misconduct on the PSS award is within the discretion of the judge.

While there is no absolute bar to PSS, the court of appeals has held that it is within the trial court’s discretion to deny PSS solely because of marital misconduct. *Sorey v. Sorey*, 757 SE2d 518 (NC App, 2014).

[GS 50-16.3A\(d\)](#) allows a jury to determine whether a party committed marital misconduct when that issue is raised in the context of a claim for alimony, but a jury has no role in the PSS process. *Wells v. Wells*, 132 NC App 401 (1999)(noting that PSS can be determined on affidavits alone). A conclusion that a spouse committed marital misconduct in a PSS order is not binding on the court in the alimony trial because PSS is a temporary order. *Wells*.

### Alimony

According to the court of appeals, the 1995 amendments replaced a “fault-based approach” with a “needs-based approach” to alimony. Under the needs-based approach, except for the rules regarding illicit sexual behavior, marital misconduct is only one of many factors considered when determining whether alimony should be awarded and when determining the amount and duration of an alimony award. *Alvarez v. Alvarez*, 134 NC App 321 (1999). The weight attributed to marital misconduct generally is completely within the discretion of the trial judge. *Romulus v. Romulus*, 215 NC App 495 (2011).

### When Fault Controls

The significant exception to the “needs-based approach” to alimony is the impact of one specific type of marital misconduct; illicit sexual behavior. The statute defines illicit sexual behavior as:

“acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in [G.S. 14-27.1\(4\)](#), voluntarily engaged in by a spouse with someone other than the other spouse”.

[GS 50-16.1A\(3\)\(a\)](#). See also *Romulus* (in addition to sexual intercourse, illicit sexual behavior includes sexual acts defined in [GS 14-27.1\(4\)](#); penetration of vagina by a finger was an act of illicit sexual behavior).

The impact of illicit sexual behavior on alimony is as follows:

- If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in [G.S. 50-16.1A\(3\)a.](#), during the marriage and prior to or on the date of separation, the court shall not award alimony.
- If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in [G.S. 50-16.1A\(3\)a.](#), during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse.
- If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court.

### [GS 50-16.3A\(a\).](#)

So an act of illicit sexual behavior committed before separation by a dependent spouse is a complete bar to alimony unless the supporting spouse also committed an act of illicit sexual behavior before the date of separation. This is true even if the supporting spouse committed other forms of marital misconduct. *See Romulus* (spouse barred from alimony due to one incident of illicit sexual behavior despite long history of domestic violence by supporting spouse).

On the other hand, the court must award alimony of some amount and duration if a supporting spouse committed an act of illicit sexual behavior before the date of separation and the dependent spouse did not. *See Fleming v. Fleming, unpublished, 765 SE2d 553 (NC App, Oct. 2014)* (trial court erred in denying alimony despite husband's illicit sexual behavior after concluding that needs of dependent spouse had been met by PSS award).